Selected Excerpts from the Utah Legislature's Debate on 1st Substitute SJR0001, Judicial Article Amendment

Utah State Senate

Committee of the Whole:

Chief Justice Hall

President Ferry, members of this honorable body, we welcome the invitation of the sponsors of this proposed judicial amendment, we are happy to be here for the purpose of lending our support to it. I am pleased to report that the judiciary as a whole, from the Supreme Court to the Justice of the Peace Court are in favor of this proposed revision. This is one of the few times that the judicial branch has been able to join its forces and get behind a piece of proposed legislation.

Although it is generally inappropriate for the judiciary to appear before the Legislature in a Committee of the Whole such as this, (as has been indicated by Senator Snow) the fact that this is a judicial article prompts us to break that precedent and appear here. And we feel that it is wholly appropriate to do that for the very simple reason that the judicial article, notwithstanding what may happen here today, one way or the other, will have very far reaching effects upon the judiciary of the State of Utah.

Some have said the judicial article that we have has served us well since statehood, and indeed it has. They go on to say then, "why change it?" Certainly there is a need for a change. Things are not the same as they were a hundred years ago in Utah. Things are definitely different. We have to use different means to cope with our problems. The legal problems, the complexity of the, are far different now than they have ever been. The fact that our constitution has been a document that has carried itself well, and has served us well, does not mean that it should not be changed from time to time when the need arises. Now this body has recognized the need to change the constitution in some respects that effect the executive branch of government and also the legislative branch of government. That has been done. That has been acknowledged that change is necessary. The judiciary is also in need of a change.

I would also like to point out that some have also viewed that the proposed change to judicial article will have the effect to establish an intermediate court of appeals. But I submit to you that that is not the issue that is before you today. Indeed it is true this change if it is adopted would

permit that, but it would also permit some other things. It would permit the court to merely be expanded, to make a larger membership, but that issue is not before this body now. That will come only if and when this constitutional revision is adopted. And I would suggest that the efforts be directed toward the passage of the document as it now exists and not looking forward to something that may occur in the future.

I am also aware that the methods for selection and retention of judges is probably the most controversial and maybe the most misunderstood portion of the proposed revision. In actuality, the selection of judges by nominating commissions however, has proven to be the most appropriate method. It has been tried and proven in a number of locations. A most important means of upgrading the judiciary is the adoption of improved methods of selecting judges. In more than a third of the states, some or all of the judges are selected under the merit plan. It has the endorsement of the American Bar Association since 1937. It is not new.

The harm of political selection of judges lies not in the fact that it tends to put politically oriented people in judicial office, prior service in other governmental posts can undoubtably be valuable to a judge. It has been well said that there is no harm in turning a politician into a judge, he may become a good judge. The curse of the elective system is that it turns every judge into a politician. Judges in elective states are obliged to engage in political activities and seek publicity for themselves in ways that prejudice their judicial independence. Actually it demeans the judicial office. At one time is was thought that judges could be removed from politics by electing them in a non-partisan manner. However, experience indicates that while non partisan elections does indeed eliminate some if the evils of partisan elections it is still highly political. And still emphasizes non-judicial rather than judicial qualifications as a basis for selection. In one respect it is worse than partisan elections in that it actually makes it possible for a candidate to get his name on the ballot even though he may have nothing to commend but his own ambition and perhaps his inability to make a living as a lawyer. Furthermore, no political party would be willing to sponsor such a candidate.

Elections, either partisan or non-partisan give a heavy advantage to the candidate who has the money to finance a campaign. Either way, voters generally have little or no acquaintance with judicial candidate, especially their judicial qualifications – the decisions voters make are mostly blind guesses. The better theory of judicial selection is one by means of appointment by a responsible elected official. It is based on sound principle of the evaluation and comparison of the respective qualifications of the candidates – call for consideration, knowledge, and judgement beyond the capacity of the electorate or any large group of people. The voice of the people may make itself heard in the appointing process to the appointing authority, that person must answer to the people for the quality of the appointments. In the federal system, and in most of the states using appointments, there is a further check on appointments through the confirmation or rejection of the legislative body. In addition, tenure of judges may be by non competitive vote by the people in a yes/no retention election.

As you are well aware, the present proposed article revision would do just that, it would permit

selection by a judicial nominating commission, appointment by the governor, review by the Senate, and thereafter retention by an uncontested election. The judiciary that I represent here today is firmly of the opinion that the constitutional revision commission has duly met its charge. I state that charge to you. It is very simple but it is appropriate to state again here today. They have defined their major objectives to:

- protect the status of the judicial branch as a co-equal, independent branch of government;
- to provide the means to develop a more efficient and effective judicial system; and
- to attract and maintain quality judges.

It is the considered opinion of the judiciary that the commission has met their charge. And I would urge this honorable body to favorably consider the proposed judicial article. Thank you very much for having me here. I should say that with me here today is one of my colleagues, Justice Dallin Oaks, and he has a couple of comments that he would like to deliver.

President Ferry: You may do so.

Associate Justice Dallin Oaks:

Mr. President, members of the Senate, thank you for permitting representatives of the judiciary to be heard on this vital matter. I would like to speak about three of the most controversial of the important provision in the proposed new judicial article. The selection, retention, and removal of judges.

These are in sections 8, 9, and 13 respectively. These subjects I submit from the outset should be in the constitution. I believe it essential for the integrity and independence of the judicial branch of government that these subjects be set out in the constitution rather being left to the law making discretion of the Legislature. I believe that is vital to the separation of powers. The United States Constitution, which we revere, details provisions for the selection of the president, the Congress, and the courts. It does not leave the selection of judges to the law making process. That system has served us well in preserving freedom and integrity in the government of the Untied States.

In so saying, I do not imply agreement with every judicial decision, but the system overall has been a good system. Indeed, an inspired system. I think we should follow that model in the constitution of the State of Utah.

There is an additional reason for doing so. Article V, Section 1 of the Constitution of this state whose amendment is not before us and which has not been questioned – indeed it is vital to the integrity of our system of government provides as follows:

"The powers of the government of the State of Utah shall be divided into three distinct

departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in cases herein expressly directed or permitted."

In view of that provision, members of the senate, we learn that it is best to be specific in the constitution about how judges are to be selected. Otherwise, the participation of other branches of government, in the selection of judges can be deemed a violation of the separation of powers.

Now to the subject of the selection of judges. The provisions of the proposed judicial article are a workable compromise. They serve the interest of an informed citizenry on judicial selection, serving on the commission to ensure that each person that could be appointed is well qualified. Second it serves the interest of the governor making the appointment, the Senate in confirming or rejecting, and the people to ratify or reject the service of a judge after a suitable period to judge his or her performance. This is an improvement over the existing system. It is a good compromise of the interest of all of the parties in the selection of judges. I think it useful to view that system, and the system of retention, in terms of history. For the first fifty years of our nation, judges were usually appointed. Just like the King of England had appointed the Colonial judges. About 1830, as part of the movement toward Jacksonian Democracy, judges came to be put into office by popular election, and most judges were being elected on party ballots. However, there were problems with this -- political control of the judiciary, charges of favoritism, and incompetent judges.

As a result, around the turn of the century most states went to election on a non-partisan basis. It was still election by the people. The problem with this system was that it did not ensure that the people put on the ballot to be elected by the people were well qualified. Finally, about the time of World War II, a system was evolved which came to be known as the Missouri Plan. Under that system you had a non-partisan commission that looked over the people who wished to be judges, assured that those who were put forward were qualified, had the governor appoint them, and later on had the judge run on his record unopposed, where the people could reject the person on the basis of performance. Utah has that system in general but it has added Senate confirmation.

Now on the subject of retention of judges. Judges are retained, under the existing system in our state, through a combination of constitutional provisions and law. Any lawyer can file to run against any judge in any election. The election therefore, becomes a contested one at the option of any member of the bar who volunteers to run. There is no screening to assure that the challenger is minimally competent. If a person files, and the judge dies before the election, the challenger automatically takes the office, never having been screened in any way for competence, even on a minimal basis. There is no screening by party, no screening by a citizen selection group or committee. That I submit to you is not a very good system for the selection of judges. It has holes in it. They need to be repaired.

Contested elections, also, as the Chief Justice has said, forces judges to raise money. It forces judges to campaign more or less. It raises questions of favoritism toward contributors or lawyers that have raised money or conducted campaigns for a judge. All of those are pernicious systems in terms of the proper functioning of the judiciary.

An uncontested election, on the other hand, such as is proposed in the proposed revision of the judicial article, focuses the attention of the electorate on the record of the judge. That becomes the issue. Not A vrs. B, but rather judge A vrs. judge As record. When combined with a knowledgeable system for evaluating judges, which the Bar association can and should develop, conduct, and make public (for public information), this system is a preferable system for knowledgeable public voting on judges. You will get a better knowledgeable review of judges, better accountability of judges, in an uncontested election than you will in a contested election where the contest is where the volunteer comes forward without any screening at all, which is our current system. The system proposed in the judicial article is not an uncompetitive election, it's not even an uncontested election. It forces the judge to run on his record, it forces the judge to compete against the electorate's ideals for their profession and what they have actually done.

Now that is a meaningful contest.

And now to the third subject, removal. In our present system Article VI, Section 19 provides for impeachment of judges and other state officers. They can be impeached for high crimes and misdemeanors, they can be impeached for misfeasance in office. That is not changed by the proposed article. A second option for removal of judges is Article VIII, Section 11 which is the method of address. This is removal by a two-thirds vote of each House for cause. The problem with this system is that it has never been used except as a threat. Its only punishment is removal– there are no lesser sanctions. It takes the time of a busy legislative session and I have noted in your prior debate that time in this body is vital. Imagine the time it would take to debate and remove a judge, and a judge knows that, which is a disadvantage to the system of address. It is also susceptible to political divisions that generate political considerations irrelevant to the merit. Experience shows that the system of address falls into that pitfall.

What is needed is an intermediate remedy that deals with offenses less than a capital offense which justifies removal. Section 13 of the proposed judicial article provides that. It is an effective system. It is a great improvement over what we have now. It gives the judicial conduct commission – it designates causes for discipline and removal – it gives authority to reprimand, censure, suspend, or involuntary retire (judges).

It is a system that is accessible twelve months of the year, not just when the Legislature is in session. And it proceeds on a confidential basis up until the time when the body takes its action – and therefore is susceptible to use, frequent use as needed. And it is also subject to some legislative control. I call to your attention the fact that the Legislature passes the laws governing the membership of the judicial conduct commission and it will also govern by appropriations (which determine) the extent of activity it wants in relation to the investigation and oversight of

the judicial branch of government.

I submit to you members of the Senate that the combination of impeachment and a judicial conduct commission is a better system than legislative address. The system that is suggested here is a great improvement over the system we have now.

Now in closing I would like to say this: the judicial article that is presented to you, as the Chief Justice has said, is an intelligent fabric for the judicial branch of government. Some may see a loose thread. As a product of compromise, it is possible that there are loose threads. I urge that if there are any loose threads that you not pick at them lest you cause the entire fabric to come unraveled. We support the Judicial Article.

Sen. Snow:
Mr. President, I do indeed want to express my personal thanks to the judiciary, to Justice Hall and to Justice Oaks. I know that it was an unprecedented act on their part and I think it does demonstrate again that they have been very much involved, have worked with the commission, and have worked with the entire judiciary beginning with the Justice's of the Peace up to the Supreme Court itself in trying to resolve many issues and attempting to bring the constitution of the State of Utah as it is related to the judiciary into the 20th century and I express my thanks. I move at this time that we dissolve the committee of the whole.

Utah House of Representatives

Committee of the Whole

Chief Justice Hall

Mr. Speaker and members of this honorable body, this is rather an unprecedented appearance before this body by members of this court. I am pleased to make this appearance today on behalf of a proposed amendment which you intend to make. The purpose of being here and breaking this type of precedent -- the amendment that is being proposed is really the life blood of the judiciary, it is something that will effect us regardless of the action you take on it. One way or the other, it will have a direct effect upon us. Hopefully you will see fit to adopt this proposed amendment. This is one of the few times that the judiciary has been completely in accord on something that has been proposed, that this body has considered. This is true from the Supreme Court down to Justice of the Peace Courts. We have had a number of compromises to reach this position. We have been able to resolve those. We are unified behind this proposal.

Some have said that the article has served us well since statehood and so why change it. The answer to that is simple: times do change and they have changed. The legal complexities of today do not compare with those of a hundred years ago. This has been fully recognized by reason of the fact that this body has seen fit in times past to amend the executive and legislative articles of the constitution. I would also point out that to some of you the proposed revision is simply a means of establishing a different composition of the court, either to expand it, or to provide for

an intermediate court of appeals. While it is true that the article would permit that, that is not what is before the body at this time. What is really before it is simply the amendment to the constitution. We will pass upon those other matters at some future time when this body convenes.

I am aware that the methods for selection and retention of judges is probably the most controversial and probably the most misunderstood portions of the proposed revision. In actuality, the selection of judges by nominating commissions has proven to be the most appropriate method. This has been a tried and proved method in a number of other jurisdictions and to limited extent our own. We have had a hybrid system as you are well aware but the nominating commissions have worked very well. The appointments that the governor has made have withstood the retention elections thereafter and I believe they have worked well. You are probably aware that I sit as chairman of the nominating commissions on the district court and supreme court level and to my way of thinking, and I think the members that have actually sat on those commission's find this to be true, that they function very well and that they are free from politics and they serve a very useful purpose of screening applicants for appointment.

A most important means of upgrading the judiciary is the adoption of approved methods of selecting judges. In more than a third of the states they do it in the manner that we are proposing in this proposed revision. The harm in political selection of judges lies not in the fact that it tends to put politically oriented people in the judicial office. Service in other governmental posts can undoubtably be valuable to a judge. It has been well said that there is no harm in turning a politician into a judge. He may become a good judge. The curse of the elective system is that it turns every judge into a politician. Judges in election states are obliged to engage in political activities and seek publicity for themselves in ways that prejudice their judicial independence and demean the judicial office. I sincerely hope that we do not ever face that type of situation and have it confront the judiciary of this state.

I know that this has been a long and arduous day for you and I know that you are fully acquainted with the content of this proposed revision so I am not going to itemize it line by line. I am in the company of my colleague Dallin Oaks and he has some comments that he would like to make so as not to intrude on the time that he would otherwise take, I am going to turn the time over to him.

Before I do that, I would like recount three goals of the Constitution Revision Commission concerning this proposed revision. First the CRC set out to protect the rights of the judiciary as a co-equal and independent branch of government. Secondly to provide the means to develop an efficient and effective judiciary; and thirdly to attract and maintain quality judges. I believe they have accomplished those purposes and I would urge your favorable consideration of the judicial article. Thank you very much.

Associate Justice Dallin Oaks

Mr. Speaker and ladies and gentleman of the House, it is a pleasure to be here. I hope that the

Chief Justice and I can be helpful in your consideration of this vital constitutional amendment. It is appropriate for judges to appear and speak to legislators only on very rare occasions, but when you consider the provisions of the constitution which is the charter of the third branch of government it is appropriate to hear the perspectives of judges, particularly on the selection, retention, and removal of judges which are the main provisions of this amendment – found in sections 8, 9, and 13 of the proposed amendment. These subjects should be in the constitution. They should not be left to legislation on a year to year basis. The integrity of the third branch of government depends upon its having charter treatment in the constitution and therefore, I submit to you it is inappropriate to have those matters left to legislation on a year to year basis. That demeans the third branch of government. It is not the approach the founding fathers took in the United States Constitution. It is not the approach the founding fathers and mothers of this state took in the Constitution of the State of Utah – that approach needs to be embodied in the constitution and the proposal does that.

We have an additional reason for treating these subjects in the constitution, and that is that there is a provision providing for the separation of powers in the Utah Constitution. That provision remains. It is not effected by what is done here today. That provision for the separation of powers makes any legislation about the selection, retention, or removal of judges suspect. We have already had two epic constitutional battles in this state which have been very unpleasant for every branch of government. Those controversies can be put to rest in the provisions of the constitution. They are put to rest by a compromise that recognizes the interest of the legislative branch, the people in their electoral process, the judicial branch, the governor, and the interest of the people of this state in qualified applicants. That compromise is embodied in the proposal put before you. And I submit that it is a workable compromise and it ought to be adopted.

Now I want to say something briefly about selection, retention, and removal.

First, on the subject of selection, as I have already referred to there is a compromise here on how judges are selected. I will not go into that in the interest of time, but it gives voice to all of all those interests, it is an improvement over the existing system, it lays some old controversies to rest, it gives due regard to everyone's interests. It represents the best modern thought. We have dealt in this country with appointment of judges by the Crown, then by governors, we have elected (judges) on partisan political ballots, we have elected them on nonpartisan ballots. Everyone of those methods of selecting judges has some profound difficulties that history has taught us. The more modern thought and the best system that compromise has been able to work out is the Missouri Plan where a qualified system of citizens put forward individuals all of whom are chosen on a non-political basis and are chosen for their qualifications as judges, the governor appoints from among that group, then the Senate confirms or rejects, and then, after a suitable period of time for the people evaluate them, the people have the right to vote against them. That is a good system.

On the subject of retention, under the existing system that we have, we have some defects that we have identified. The proposal before you would remedy those defects. A word about those

defects. Under the existing system, when it comes time for a judge's term to end, any lawyer can file against that judge for any reason or for no reason. There is no screening by the political process, by parties, by a committee of citizens, or by anyone else for a person to file against a judge. Any lawyer can file for a good reason or no reason. And the election that ensues is a contested election that has two problems: the issue is choosing between the judge and the challenger which focuses the issue on a contested election in the same way that you are brought to this body.

There is nothing wrong with a contested election, it is the heart of democracy. But there is some problems with it when you apply them to judges. Judges are not the same as legislators, they are not the same as elected executive officials. You have passed laws in this chamber that cut me as a judge and every other judge off from the practice or our profession, from almost every source of outside income, except the collection of bank interest and dividends, and even that is limited because we have to be disqualified from hearing cases involving corporations in which we hold stock. Judges are distinctly limited in outside income. You are not limited in outside income.

But how would you like to run every two years and be dependent upon your finances for what you are paid for sitting in this body. Judges are in a position in which they are isolated in order to perform their function, they are isolated from social contacts, they are isolated from outside income, they are vulnerable from people who bring money in from the outside to challenge them. And the performance of judicial responsibilities would be a job not worth aspiring to by any lawyer worth his salt or her salt if judges had to be elected in the same way as people in the executive and legislative branches. They are simply on a different footing. They have to be in order to perform the function the constitution gives them and in order to stay within the ground rules that you as the lawmakers of the state have properly imposed upon the judiciary.

In the contested election which we have now, anyone who files against a judge automatically takes that office if the judge dies in the course of the election. That is a flaw. If people were screened before they could run for office this would not be a flaw, but they are not.
Now an uncontested election which is proposed in the constitutional revision focuses the attention of the electorate on the qualifications of the judge. The issue is shall we retain the judge or shall we get rid of the judge. That is the way to conduct an election involving a judge. I believe that judges should be accountable but I think that they ought to be accountable on their records, not in a beauty contest, or in a money contest. If you have to run for office, how does a judge do that. He organizes lawyers to run a campaign for him, and every lawyer that comes into court against a lawyer that has helped elect that judge feels like he is being put upon and he is right. And the judge feels ambiguous. It is very difficult to conduct judging functions when you have had to impose on lawyers to contribute to your campaign or get out and work for you.

Judges should not be put in that position, but they ought to be accountable on their record.
And I submit to you that the proposal before you is a great improvement over the system we have now because it forces the judge to run against his or her record. And I would suggest to the bar association that they get a better system of rating judges than we have now and make it public. And make judicial evaluations something real in this country and they can do that in an

uncontested election such as is proposed here. They cannot very well do that, as was pointed in the Senate this morning, because they cannot take sides in a contested election and evaluate the lawyer as well as the judge. You will get better evaluations out of the bar association in an uncontested election. I believe in that system because it will give the people a better shot at a bad judge and they should have a better shot at a bad judge.

Only a word about removal. I believe in the removal provisions because they are an improvement over what we have now. What we have now is impeachment and address. Both impeachment and address have to be funneled through these bodies as busy as you are and they amount to capital punishment – they kick the judge off the bench. That is all well and good for capital offenses so to speak (I use to word capital to indicate the maximum, not in the sense of taking the life but taking the office). Impeachment and address are alright for the heavy offenses but what about the marginal offender who is a judge who needs to be corrected. You do not have a remedy in either address or impeachment. This proposal provides an intermediate remedy with sanctions such as censure, even suspension, reprimand, and a body that is selected according to law you will determine as lawmakers what that body will be, they supervise the judges and will have intermediate remedies. That is going to provide better supervision of judges in this state.

Now our time is up, I will conclude. I would just say in general that the judicial article which is being placed before you as an amendment is an intelligent fabric for the third branch of government in this state. There may be some loose ends in that fabric, if there are they are minor, and they are loose ends. I urge you not to pluck at those loose ends less the whole fabric come unraveled. Thank you.

Rep. Moss:
I assume there will be some questions for our visitors, I'm wondering if there are if we might have an extension of five minutes on the committee to entertain those questions before they leave.

Rep. Schmutz:
Yes. I had a question. You talked about the judges record, if you would be running against that record. Is there any provision to make that record public so people know it? How are they going to find out if he has been a good or a bad judge, to make a judgement call on the vote?

Justice Oaks:
I believe there are two ways that it could be handled Representative Schmutz. I think that subject is susceptible to the law making power. I think the laws can be made to make information available to the public on that subject. That is a very tender area that has to be approached very carefully because one needs to be careful of the information that is made available so that it is accurate and can be understood. I think that the second answer is that we have to depend on the Bar to a considerable extent because the Bar sees the judges on a day to day basis. It is my contention that the Bar is responsible enough to evolve evaluation mechanisms and make them public, so the public can have the insights of the members of the Bar who practice before the

judges. Those are two ways to get at it.

Rep. Schmutz:
You actually see the Bar doing that?

Justice Oaks:
Yes. As a member of the Illinois Bar, I worked hard to get a judicial evaluation system working in the city of Chicago. I won't go into detail, but after a considerable period of time, we did that, it worked. We got rid of some bad judges because when the Bar came out and said this guy is impossible, the public paid attention to that, the media picked it up and it worked. But I don't think that the judicial evaluation will work without the energetic involvement of the State Bar. I think the Bar ought to be challenged to do that, but I think they will if you get a straight retention election. It is my intention, with such influences that I have to bring, that the Bar will do that because I have been involved in it as a member of the Bar. I know it works. I think it is essential.